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June 30, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2013-CRNM State of Wisconsin v. War Nakula-Reginald Marion (L.C. # 2015CM2635)
2017AP2014-CRNM State of Wisconsin v. War Nakula-Reginald Marion (L.C. # 2014CM2943)

Before Brash, P.J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated matters, War Nakula-Reginald Marion appeals the judgments convicting him of four misdemeanors following a jury trial: battery; criminal trespass to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

dwelling; disorderly conduct; and intimidation of a witness, all as acts of domestic abuse. His appellate counsel, Heather L. Johnson, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Marion received a copy of the report and filed a seventy-nine page response. Upon consideration of the report, Marion's response, and an independent review of the records as mandated by ***Anders***, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The charges against Marion stemmed from incidents that occurred during the summer of 2014. According to the complaint, Marion positioned himself outside the victim's home for two hours and refused to leave. The victim relayed to police officers that Marion called and sent text messages threatening to cause harm to her home and her vehicle. Sometime after 1:00 a.m., the victim, who had been asleep, heard a loud crash and saw that her box fan had been knocked over. Marion was climbing through the window without her permission.

The victim told the police officers that Marion punched her in the back of the head, knocking her down, and then continued to punch her. When the victim's daughter intervened, Marion bit the daughter's finger.[2] In Milwaukee Co. case No. 2014CM2943, the State charged Marion with four misdemeanors: two counts of battery (one related to the victim and one related to the victim's daughter), criminal trespass to dwelling, and disorderly conduct. All but the battery count involving the victim's daughter were charged as acts of domestic abuse. That battery count was later dismissed.

[2] The victim and Marion have a child in common—this was the daughter who intervened.

While Milwaukee Co. case No. 2014CM2943 was pending, the State became aware of a letter Marion sent to the victim. According to the complaint, the letter stated, in relevant part:

> "I just came back from court today and they trying to start the whole case back over because I fired my old lawyer. I ask that you and baby girl write a letter to the court and tell them you ain't coming at all so they can dismiss the case…. Just tell them we just had a regular argument like all relationships do and leave it at that."

(One set of internal quotation marks omitted.) Based on this letter, Marion was charged with one count of misdemeanor intimidation of a witness as an act of domestic abuse in Milwaukee Co. case No. 2015CM2635.

At the jury trial that followed, Marion represented himself, with the assistance of standby counsel.[3] The jury found Marion guilty of all of the charges. The trial court imposed the maximum consecutive sentences: nine month in jail for battery; nine months in jail for criminal trespass to a dwelling; ninety days in jail for disorderly conduct; and nine months in jail for intimidation of a witness. This appeal follows.

The no-merit report is thorough and discusses whether there was sufficient evidence for findings of guilt. The no-merit report also addresses whether the trial court properly resolved various motions, including Marion's request for recusal and judicial substitution, Marion's motion to dismiss on ground of double jeopardy/multiplicity, and the State's motion for forfeiture by wrongdoing. The no-merit report considers whether the trial court erred when it included the self-defense instruction at the end of trial and whether there is arguable merit to a sentencing challenge. This court is satisfied that the no-merit report properly analyzes the issues

[3] The attorney who served as standby counsel was Marion's third appointed attorney.

it raises as being without merit and that no procedural trial errors occurred.[4] We discuss these potential issues further only insofar as they relate to arguments raised by Marion in his response.

Marion argues that the trial court erred when it allowed various exhibits to be admitted as evidence at trial. Among the exhibits he challenges are photos of an injury sustained by his daughter after she intervened. Marion argues that in so doing, the trial court "was prejudicial and only looking out for the [S]tate's interest" given that the battery charge involving his daughter had previously been dismissed. He argues that presenting this evidence after the charge was dismissed was misleading to the jurors, who could have made their decision based on the belief that there were still two misdemeanor battery counts pending.

During trial, the State sought to introduce photographs of the daughter's injury, and Marion objected. To be admissible at trial, evidence must be relevant. WIS. STAT. § 904.02. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Whether to admit evidence is a matter within the trial court's discretion. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). When this court reviews a trial court's exercise of discretion, the question is whether that

[4] This court placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). At issue in ***Trammell*** was the continued viability of jury instruction WIS JI—CRIMINAL 140, an instruction that was given in Marion's case. The supreme court has since issued a decision in ***Trammell***, holding "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Marion's trial.

discretion was exercised "according to accepted legal standards and if it is in accordance with the facts on the record." ***Id.***

Here, despite Marion's objections, the trial court concluded the photos were relevant evidence insofar as they supported the statement by the victim that in the course of the battery, her daughter intervened and was injured. There would be no arguable merit to challenging the trial court's ruling in this regard. This court further notes that the jury instructions and verdict forms were clear that there was only one pending battery charge. Jurors are presumed to follow jury instructions. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

Marion also argues that the trial court erred when it read the self-defense instruction to the jury at the end of the trial even though Marion did not request that the court do so. During closing argument, Marion stated that he has "to be the first aggressor to perform battery of somebody." He further stated: "I'm not the one who started it. That shows it's not intentional[.]" Marion continued: "She took charge and I'm defending myself still with the stick in my hand, we was wrestling."

After the jury left to deliberate, the trial court asked the parties whether there were any objections to the instructions as read. The following exchange took place:

> MR. MARION: I just wanted to ask, so the jury is looking at my self-defense argument?
>
> THE COURT: I read the instruction even though you neglected to ask me for it, which is your responsibility in representing yourself, because I felt like after listening to your argument that that's really what you were arguing. Yes, so that's what they will see is the instruction I read to them….
>
> Was there any objection to the instructions as read, Mr. Marion?

MR. MARION: No.

Although Marion did not ask for this jury instruction, the record reflects that he presented a self-defense argument during trial. Trial courts have broad authority to determine the appropriate instruction given a jury. ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. "Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will we reverse and order a new trial." ***Id.*** There would be no arguable merit to challenging the trial court's decision to provide the self-defense instruction to the jury.

We further address, in passing, Marion's claim that appellate counsel was ineffective, for among other reasons, not addressing all of the myriad of issues that Marion believes have arguable merit. Appellate counsel was not required to discuss each and every issue that Marion flagged. Moreover, our review of the records discloses no potential issues for appeal. This court has reviewed and considered the various issues raised by Marion. To the extent we did not specifically address them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Marion further in this appeal.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Heather L. Johnson is relieved of further representation of War Nakula-Reginald Marion in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals